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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

REPLY BRIEF FOR PETITIONER.

WALTER H. POLLAK,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER.

(1)

The Government's brief (p. 8) cites *Helvering v. Wilshire Oil Co.*, 208 U. S. 90, 100, and *Morrissey v. Commissioner*, 296 U. S. 344, 354, for the principle that administrative regulation may give a construction to—even change the construction of—a statute. Assume, if you will, that the principle applies in a criminal case. It cannot apply in this case:

The Government relies upon a "Notice to Bearers of Passports" as in the Government's view casting some light on the meaning of "use" in the statute. But (a) the Notice is not a regulation. The Notice does not call itself a regulation and does not purport to regulate. It makes reference,

among other things, to the action of foreign governments—which cannot possibly be the subject of regulation by our own. And (b) “use” does not appear in the Notice.

(2)

The Government's brief (pp. 11-12) excerpts a clause or two about “wilful” from the opinion of the District of Columbia Court of Appeals in *Townsend v. United States*, 95 F. (2d) 352, cert. den. 303 U. S. 664. In *Townsend's* case the wilful act was a negative act, a “refusal” to testify. As to that kind of act wilfulness may mean little more than with deliberation. Above all, the trial court in *Townsend's* case gave the following charge—“purporting,” as the Court of Appeals remarked (95 F. [2d], at 361), “to be based on the *Murdock Case*”—“If you believe that the reasons stated by the defendant in his refusal to remain longer at the Committee hearing were given in good faith and based upon his actual belief you should consider those reasons in determining whether or not his refusal to remain was wilful.”

(3)

Petitioner has not “fallen upon another horn of his dilemma” (Gov. brief, p. 13). Petitioner's point is *not* that the crime of which he was convicted is without moral turpitude. His point on the contrary is that the accusation is of a morally wrong act—done “wilfully and knowingly”—and that on the undisputed facts there was no moral turpitude and no wilfulness. The presentation by a citizen, in order to establish his citizenship, of a passport that correctly declares the fact of citizenship is not wilful wrong—not wrong at all.

Respectfully submitted,

WALTER H. POLLAK,
Attorney for Petitioner.

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